NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION PURSUANT TO SIXTH CIRCUIT
RULE 24

No. 92-5286

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VICTOR C. GRAHN; JAMES L. COOPER, JR.; RICHARD DANIE GALLAGHER; COURTNEY B.L. EDWARDS; and RONALD WAYNE DABE,

Plaintiffs-Appellants

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, LOCAL 608, affiliated with the International Brotherhood of Teamsters, AFL-CIO; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO; UNITED PARCEL SERVICE CO.; and INDEPENDENT PILOTS ASSOCIATION,

Defendants-Appellees

On Appeal From The United States District Court For The Western District Of Kentucky

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Decided and Filed January 5, 1993

Before: JONES and RYAN, Circuit Judges; and
PECK, Senior Circuit Judge.

PER CURIAM. Plaintiffs-Appellants are individual pilots employed by the Defendant United Parcel Service (UPS). Other Defendants are the International Brotherhood of Teamsters Airline Division, Local 608, its International, and the Independent Pilots Association, an unincorporated labor organization existing under the laws of Kentucky that has been representing UPS crewmembers since January 1990.

Plaintiffs-Appellants appeal the summary judgment granted in favor of the Defendants. They claimed in the district court that the Defendants breached a collective bargaining agreement and their duty of fair representation by entering into a written side agreement which effectively overruled a prior arbitration decision. Cross motions for summary judgment were filed.

A final order denying Plaintiffs' Motion for Summary Judgment against Defendants and granting Defendants' Motion for Summary Judgment against Plaintiffs was entered by the district court. The Plaintiffs' claims against Defendants were then dismissed with prejudice on January 24, 1992.

Having carefully reviewed the record and the issues presented in the appellate briefs and the arguments of

counsel, we find no error warranting reversal. Therefore, we **AFFIRM** the district court's decision.

Civil Action No. C 89-0983-L(B)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

VICTOR G. GRAHN, et al, - - - - - - - - Plaintiffs

v.

THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS AIRLINE DIVISION,
LOCAL 608, AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN,
AND HELPERS OF AMERICA, AFL-CIO, et al,
- - - - - - Defendants

ORDER--Entered January 24, 1992

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the motion of the plaintiffs for summary judgment against the defendants be and it hereby is denied.

IT IS FURTHER ORDERED that the motion of the defendants for summary judgment on the claims of the plaintiffs against them be and it hereby is granted and the plaintiffs' claims are dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 24th day of January, 1992.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Senior Judge, U.S. District Court

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- - - - - - Defendants

MEMORANDUM---Entered January 24, 1992

This matter is before the Court on cross-motions for summary judgment. Plaintiffs assert that defendants breached the collective bargaining agreement and the duty of fair representation by entering into a written side agreement regarding seniority which effectively overruled a prior "final

and binding" decision of the Systems Board, the entity charged by the CBA with arbitrating grievances.[1] We found that the Board decision was not final and binding as to subsequent agreements between the Union and the Company and ordered the parties to submit supplemental memoranda on the defendants' authority to bind the union to side agreements.

The defendants have submitted copies of side letters of agreement which involve the settlement of grievances and the alteration of the parties' contractual obligations. The defendants have also presented affidavits of Dan F. Darrow, former Director of the Parceland (sic) Small Package Trade Division and Co-Chair of the Teamsters National United Parcel Service Negotiating Committee, Al Barlow, a member of the Teamsters United Parcel Service National Negotiating Committee and Union Chair to the National Grievance Committee, William A. Ferchek (sic), Trustee of Local 608 at the times relevant to this action and a signatory to the side agreement, and Neil Konietzko, Labor Relations Manager for UPS. The affiants attest to the local union officers' authority to negotiate binding amendments to the Flight Crewmember Supplemental Agreement to the CBA. Plaintiffs do not controvert the affidavits, but argue instead that even if the local union had authority to enter into binding side agreements, the members of the "joint company-union committee" who recommended the change in the contractual provision were "self-serving." Plaintiffs allegations' (sic) are not sufficient to withstand the defendants' motion for

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[1]The facts of the case are set forth with greater specificity in the Court's Memorandum Opinion of June 18, 1991, incorporated herein by reference.

summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986).

An appropriate order has been entered this 24 day of January, 1992.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Senior Judge, U. S. District Court

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- - - - - - Defendants

MEMORANDUM AND ORDER--Entered June 18, 1991

This matter is before the Court on the motions of all parties for summary judgment. Fed.R.Civ.P. 56.

Plaintiffs are employed as flight crew members by the defendant, United Parcel Service Company (UPS). Prior to

August 24, 1987, UPS contracted with four contract carriers to provide air crews and maintenance crews for aircraft leased to the contract carriers by UPS. UPS non-flight-related employees were represented by the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO (Teamsters International).

In 1986, UPS entered into a joint venture with DHL Airways and formed International Parcel Express (IPX). In 1987, IPX merged with UPS and 24 IPX flight crewmembers were absorbed into UPS and assigned seniority by their date of hire by UPS. The new flight crewmembers and Dan Darrow, International Brotherhood of Teamsters Airline Division, Local 608 (Local 608), negotiated a Flight Crewmember Supplemental Agreement (Supplemental Agreement) to the Teamsters International National Master Collective Bargaining Agreement (CBA).[1] The Supplemental Agreement was either to "supersede" or to add to the "corresponding articles and subsections of the [CBA]" and it stated that the provisions of the CBA "shall prevail,...[e]xcept as provided herein."

The CBA provided for grievance procedures to be set forth in "applicable Supplements...." CBA, Article 7. Article 16 of the Supplement called for resolution of grievances by informal discussions between the crewmember (grievant) and the Chief Pilot or the Chief Pilot's designee and if no solution was reached then the grievance was to be "reduced to writing and presented to the Chief Pilot or his designee." The Chief Pilot then was to issue a written

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[1]UPS flight crewmembers are now represented by the Independent Pilots Association, named as a defendant in this action.

decision. If the grievant wished to appeal the Chief Pilot's decision, he was to present the appeal in writing to the Manager of Flight, or his designee and the Manager of Flight or his designee was required to hold a hearing and announce his decision in writing. A further appeal could be made to the "United Parcel Service System Board of Adjustment" (the Board). The appeal to the Board was to be filed within thirty (30) days from "receipt by the grievant(s) of the written decision of the Manager of Flight, or his designee."

The Board was established by Article 17 of the Supplemental Agreement. It was to consist of four members, two selected by the Company and two selected by the Union. The Company and the Union were to designate an alternate to serve in the place of an absent Board member. The Board was to designate one member to act as Chairman and one member to act as Vice Chairman. The Board was to decide disputes by a majority vote of all members and the Board's decision was final and binding.

Article 17(E) provided:

> When a dispute is properly submitted to the Board for hearing...and the Board is unable to decide the dispute by majority vote, the Board shall declare itself deadlocked and it shall select an arbitrator.... The arbitrator shall join the Board as a Board Member and as Chairman thereof in the subsequent consideration and hearing of the dispute. The Board, so composed, shall be competent to decide said dispute by majority vote. Decisions of the Board so composed shall be final and binding on the parties.

In addition, Article 17(M) provided:

> The Board shall maintain a record of all matters submitted to it for its consideration and of all findings and decisions made by it.

A Transition Letter of Agreement (Transition Letter) to cover seniority issues related to UPS' hiring of all contract carriers' flight employees from January 4, 1988 to January 1, 1989 was incorporated into Article 4 of the Supplemental Agreement. The Transition Letter divided seniority into Group I and Group II as follows:

> During the transition phase ... seniority groups will be established and added to the seniority list in Article 4 ... beginning with number twenty-five (25).
>
> Seniority will be assigned to crewmembers using the following procedure:
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> A. Group I shall be former Company contractor crewmembers who were flying for a Company contractor on or after September 1, 1987, and also crewmembers who are acquired as a result of a merger with, or acquisition of, another carrier. Group I crewmembers will be hired in position by status and aircraft type. Group I contractor crewmembers will be positioned on the administrative lists by those hired September 1, 1987 and earlier, arranged by date of birth followed by those hired after September 1, 1987, arranged by date of birth.

....

> B. Group II will be crewmembers other than those crewmembers specified in Group I above. Group II crewmembers will be hired in position by status and aircraft type.

Group I is the preferential seniority status. Plaintiffs allege that they are Group I employees, having been contract flight crewmembers with Orion Air and having been hired by and flying for Orion before September 1, 1987.

The first seniority list went into effect in January, 1989.[2] Letters of protest were written by eighteen crewmen who had been classified as Group IA.[3] Dick Green, a crewmember who had participated in the negotiation of the Transition Letter was among those protesting. (Konietzko depo. at p. 37). The grievants alleged violation of Article 4 and the Transition Letter. William Ferchak, the newly appointed trustee of Local 608, elected to treat the letters as grievances. Company official waived the grievance process and the grievances were heard for the first time before the Board in February, 1989. (Wallace depo. at p. 80). Neil Konietzko, Air Region Labor Relations Manager for UPS, Lee Wallace, UPS Flight Operations Manager, Ferchak and Robert Miller, chief steward for Local 608 were the Board members. (Wallace depo. at p. 78). The Board decided on March 9, 1989 that:

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[2]With the exception of plaintiff Edwards, plaintiffs claim they were incorrectly positioned on the seniority list

[3]Plaintiff Gallagher was the only plaintiff who grieved

> All crewmembers hired by the Company in 1988 and who were previously working for a company contractor and who were hired by the contractor prior to September 1, 1987, regardless of the date of IOE [initial operating experience] completion, shall be placed in Group I; followed by all crewmembers hired by the Company in 1988 who were previously working for a company contractor and who were hired by the contractor on or after September 1, 1987. There shall be no retroactive compensation.[4]

The Board published not only this decision, but also a summary of the evidence relied upon to reach the decision in accordance with Article 17 (M).

On March 10, 1989, a revised seniority list was posted based on the Board's decision. Plaintiffs claim that they were correctly positioned in Group I on the revised list.

Approximately 156 crewmembers whose seniority was affected adversely protested the March decision. The informal grievance procedure was waived and Ferchak and Konietzko called a Board meeting during June to hear 50 grievances. (Konietzko depo. at p. 31). The board members were Konietzko, Wallace, Ferchak and Dana Bennet, a union stewart (sic). After hearing evidence and testimony, the Board issued a decision that stated simply that the "case is

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[4]Wallace testified that he was involved in the negotiations of the Transition Letter and that the March 9th decision was contrary to the intent of the Letter of Transition. (Wallace depo. at p. 85). Konietzko testified that he was not in concurrence with the decision. (Konietzko depo. at p. 33).

referred back to a joint company-union committee for resolution."[5] Konietzko testified that the Board was not deadlocked. (Id. at p. 58). However, unlike the prior Board decision, the reasons for the referral were never put into writing or made public.[6]

The Board then appointed a "joint company-union committee." Konietzko and Wallace testified that they, Ferchak and Miller named First Officer Randy Safewright, First Officer Jim Yonts, Second Officer John Hallin and First Officer Ken Dills to the committee.[7] Safewright and Yonts had presented grievances at the June Board meeting and Hallin and Dills had argued at the February Board meeting.[8] Wallace testified that "[the committee's] charge was to resolve the conflict through negotiation." (Wallace depo. at p. 125). Wallace also testified, "the decision of the committee was given back to the company and union, not to the system board." The substance of the committee's

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[5]Introduced into evidence were four letters from Local 608 representatives who negotiated the Transition Letter with UPS. The letters stated that the March decision was inconsistent with the Union's intent in negotiating the Transition Letter and that UPS' original seniority list accurately reflected the Union's intent. One of the letters was written by Green who had presented evidence at the February Board meeting in favor of the February grievants. See Ferchak depo. at pp. 52 and 40, UPS Exh. 11.

[6]Ferchak testified that he didn't think there was proper evidence before the board to reverse the March decision. (Ferchak depo. at p. 43)

[7]Ferchak testified, however, that the decision of who would be on the committee was decided by "the people themselves." (Ferchak depo. at p. 57). Wallace testified that Dills declined to participate. (Wallace depo. at p. 124).

[8]Konietzko testified that the reference in the June Board decision to a "joint company-union committee" meant that the seniority dispute was referred back to the parties for resolution. (Konietzko dep. at p. 53)

decision was included in an (sic) separate document entitled Agreement on Development of Seniority List (Agreement). The Agreement was signed by Ferchak and Konietzko and provided:

> All crewmembers hired by the Company in 1988 who were previously working for a company contractor ... and who were hired by the contractor prior to September 1, 1987, and successfully completed all phases of ground school relative to the seat position held prior to September 1, 1987, regardless of date of IOE completion, shall be placed in Group I; followed by all crewmembers hired by the company in 1988 who were previously working for a company contractor ... and who were hired by the Contractor on or after September 1, 1987, and those who had not yet successfully completed all phases of ground school relative to the seat position.[9]

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[9]Wallace testified that he had input into the company's decision to accept the committee's decision and that he agreed with the decision, but that the decision was not the interpretation of Article 4 as he understood it to be during negotiations of the transition letter nor was it the same position he held when he explained seniority status to newly hired UPS employees. (Wallace dep. at p. 133).

Ferchak testified that he signed the Agreement based on the committee's "recommendation" and "verbal evidence" presented by the committee. (Ferchak depo. at pp 69-70). There is no record of verbal evidence. Ferchak also testified that at the time of the February Board meeting, he had "no clear position" on the matter, but that he had a clear position in August. (Id. at p. 86). Konietzko also characterized the committee's decision as a recommendation. (Konietzko depo. at p. 75).

The seniority list was adjusted on August 2, 1989 to reflect the Agreement. The Agreement required those crewmembers hired by UPS in an upgraded status to be in Group IA, unless they had completed their ground school training for the upgraded position prior to September 1, 1987. Plaintiffs had been hired in an upgraded status, but had not completed ground school training for the upgraded position prior to September 1, 1987 and their seniority was adjusted to reflect a Group IA status.[10] (Grahn depo. at p. 6; Gallagher depo. at p. 5; Dabe depo. at p. 5; Cooper depo. at p. 4, and Edwards depo. at p. 6).

Except for Dabe, the plaintiffs filed grievances requesting that the February Board decision remain controlling and the Agreement be voided. Grahn's grievance was denied by the UPS and the Union. He alleges that the Union has denied "any meaningful appeal" and plaintiffs allege that the Union has refused to process their grievances. (UPS ex. 26, 31, 33; Union ex. 1-4 and Grahn pp 100-104).

Plaintiffs allege that they were arbitrarily removed from their rightful seniority positions by UPS' breach of the CBA and by the defendant Unions' breach of duty of fair representation and they assert jurisdiction pursuant to the Railway Labor Act, Title 45 U.S.C. Sections 151 et seq. (hereinafter referred to as the RLA).[11] Plaintiffs also allege

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[10]By August 2nd, Grahn and Edwards had been awarded captain bids. Upon release of the Agreement, Grahn was removed from the "upgrade program" after completing two and one-half weeks of the three and one-half week captain ground school.

[11]The District Court does not have jurisdiction over disputes involving "the interpretation or application of agreements concerning rates of pay, rules or working conditions,....." Title 45 U.S.C. § 153 First (i) (1970).

that the defendants conspired to change the CBA and Transition Letter to the detriment and injury of the plaintiffs.

The record shows that the final disposition of the grievance heard in June by the Board was not accomplished by a Board decision in the manner contemplated in Article 17(E) of the Supplemental Agreement. There is no record that the committee ever returned to the Board to argue or to support its recommendation, but rather the evidence suggests that the committee submitted the recommendation directly to the union and the company.[12] It does not appear that any formal request to negotiate such an agreement was made by either signatory or that the procedures mandated by the Railway Labor Act, Section 156 for changing collective bargaining agreements were followed in its adoption.

The RLA was enacted for the purpose of promoting stable labor-management relations in the railroad industry. Air Line Pilots Association, Int'l v. Eastern Air Lines, 701 F.Supp. 865, 872 (D.D.C. 1988). With the exception of Section 3, Title 45 U.S.C. Section 153 which established the National Railroad Adjustment Board, Congress extended the RLA in 1936 to cover the air transportation industry. Title 45 U.S.C. § 185; International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682, 685, 83 S. Ct. 958, 10 L.Ed.2d 67 (1963). Under the RLA, employers and unions involved in the air transportation industry are required to establish, generally in their collective bargaining agreements or side agreements accompanying the collective bargaining agreement, system, group or regional boards of adjustment composed of members selected by the air carriers and by the

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[12]There is no written record of the Board's consideration of the recommendation as required in Article 17(M) of the Supplemental Agreement.

employees' representatives. Id., at 686, 83 S. Ct. 959; Baylis v. Mariott Corp., 843 F.2d 658, 662 (1st Cir. 1988); Title 45 U.S.C. §§ 153, 184-185. Adjustment boards have jurisdiction over "minor" disputes which "grow[] out" of grievances or the "interpretation or application of agreements concerning rates of pay, rules, or working conditions..." and the decisions of the boards are final and binding upon the parties involved in the dispute. 45 U.S.C. §§ 183, 184; Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945). The jurisdiction of the defendant Unions' Board is set forth in Article 17, Section C as follows:

> 1. The Board shall have jurisdiction over all disputes growing out of grievances or out of the interpretation or application of any of the terms of this Agreement or amendments thereto. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by this or other existing agreements between the parties hereto.
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> 2. The Board shall consider any dispute properly submitted to it when such dispute has not been previously settled in accordance with the provisions of Article 16.

It is undisputed that the proceedings and decision of the February Board conformed with Article 16 and therefore the Board which convened in June did not have the authority to settle the dispute before it. Section C establishes that a Board decision is "final and binding" only as to subsequent

Board decisions, not to agreements between the Union and the Company. The issue to be resolved in the motions for summary judgment is not whether the Board had the power to reconsider a "final and binding decision," Ozark Air Lines, Inc. v. National Mediation Board, 797 F.2d 557 (8th Cir. 1986); Air Line Pilots Ass'n v. Northwest Airlines, Inc., 498 F.Supp. 613 (D. Minn. 1980), but whether company and union representatives were authorized to create a "side agreement" purporting to interpret a provision of the Supplemental Agreement resolved previously by a Board Ruling.

Konietzko testified that local unions typically enter into side letters of agreement to settle differences otherwise unresolved by the CBA. He testified that "generally and historically our side letters of agreement get incorporated into the next contract" and that the letter of agreement is submitted to the national negotiating committee during the next master contract negotiation. Konietzko depo. at pp. 95 and 96. However, there is no other evidence in the record to support the view that Local 608 had apparent authority to vary the CBA with side agreements. See Moreau v. Local Union No. 247, 851 F.2d 516 (1st Cir. 1986)("An agreement entered into by a union representative with apparent authority to bind the union is valid and binding even if actual authority, such as through membership ratification is lacking", Id. citing Moreau v. James River-Otis, 767 F.2d 6, 9 (1st Cir. 1985)). Plaintiffs have not specifically addressed the issue of apparent authority, arguing instead that Article 2, Section of the CBA forbids such agreements.

> Article 2, Section 2 - Riders
> No new Supplements, Riders or Addenda to this Agreement shall be negotiated by any of

> the parties hereto, unless otherwise agreed to by the Employer and the National Negotiating Committee. Any Supplement, Rider or Addendum not agreed to by the National Negotiating Committee will be null and void.

This Court suggests that the provision is subject to either interpretation. Under plaintiffs' theory, the Company and Union could never enter into a side agreement unless it was first agreed to by the National Negotiating Committee. Under the defendants' theory, a side agreement could be entered into and then, if unsatisfactory to the National Negotiating Committee, subsequently voided at the negotiation of the CBA.

The motions of the parties for summary judgment will be held in abeyance. The defendant Local 608, or any other defendant, will be granted sixty days in which to brief and submit to the Court any memoranda or evidence regarding apparent authority. At the expiration of that time, the Court will review the supplemental pleadings. If no party wishes to enter additional pleadings, the Court will order the defendants to submit the question of the interpretation of Article 2, Section 2 to the National Grievance Committee for resolution. See Article 8 of the CBA outlining the procedures for submission.

IT IS SO ORDERED this 18th day of June, 1991.

/s/ Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
Chief Judge, U. S. District Court

FEDERAL RULES OF CIVIL PROCEDURE

RULE 56. SUMMARY JUDGMENT

(c) **Motions and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse

party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.